APPENDIX A

Petition for Review of a Final Order of the Benefits Review Board before Butzner, Russell and Sprouse, Circuit Judges.....A-1

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UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 81-1559

Howard LeMelle,

Petitioner,

-v-

B. F. Diamond Construction Company and Aetna Casualty & Surety Company,

and

Director, Office of Workers' Compensation Programs, United States Department of Labor,

Respondents.

On Petition for Review of a Final Order of the Benefits Review Board.

Argued: December 11, 1981

Decided: March 25, 1982

Before BUTZNER, RUSSELL and SPROUSE,

Circuit Judges.

John H. Klein, Mark C. Walters (Breit, Rutter & Montagna on brief) for Appellant; Ralph E. Lawrence (White, Johnson & Lawrence on brief) for Appellees.

SPROUSE, Circuit Judge:

Howard E. LeMelle appeals from the decision of the Benefits Review Board (Board) of the Department of Labor that he was not entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§901 et seq. (LHWCA). At issue is whether a construction worker employed in building a bridge over navigable water, designed to benefit both highway traffic and river navigation, is engaged in maritime employment within the meaning of the LHWCA. We hold that he is and reverse

the determination of the Board.

LeMelle was employed by B. F. Diamond Construction Co. as a concrete finisher on the James River Bridge project at Newport News, Virginia. The purpose of the project was to demolish and replace the old James River Bridge. Both the old and new bridges contained a stationary section and a "lift" or draw section that could be raised to allow water traffic to pass through.

LeMelle was working on a fixed section of the bridge approximately one mile from shore and eight to ten feet above the water. He was pouring and vibrating concrete inside a form on the piling closest to the draw section of the bridge. He was transported to work by boat and was carried ashore by tugboat after his injury before he could be transported to a hospital. During his work, he had been required to wear a life

jacket and was continually over the water.

The James River, at the site of the bridge, is indisputably navigable. The United States Coast Guard was consulted in the planning of the bridge project and a Coast Guard official concluded:

> Navigation of the James River through the bridge site includes ocean going ships, tugs with tows, and a wide range of pleasure craft from small power boats to large cabin cruisers and sailboats.

Both the Coast Guard and the Virginia Department of Highways were required to comment officially on various aspects of the project. The Coast Guard indicated that the improved bridge would be an aid to navigation:

> The proposed bridge provides a 100 feet more horizontal clearance than the existing bridge. The additional horizontal clearance allows more space for use by vessels passing each other beneath the bridge and reduces the chances

> of a vessel collision with the bridge. The proposed bridge provides 10 feet more vertical clearance than the existing bridge which is expected to eliminate most draw openings except for ocean going ships.

The Department of Highways' statements were of the same tenor--that the new lift span was designed to be, among other things, an aid to navigation.

The LHWCA, as it was amended in 1972, requires an injured worker, in order to be eligible for benefits, to qualify under both a situs test and a status test. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); I.T.O. Corporation of Baltimore v. Benefits Review Board, 542 F.2d 903 (4th Cir. 1976), modified en banc, 542 F.2d 903 (4th Cir. 1976). That is, the injury must occur upon the navigable waters of the United States as defined by the Act and the claimant must have the status of an employee as defined in the

Act. The parties here agree that the situs requirement for LeMelle's claim is satisfied. The only contested issue is his status as a covered employee. Section 2(3) of the LHWCA as amended in 1972 provides:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. §902(3).

The respondents Diamond and Aetna urge, and the majority of the Board found, that LeMelle was not engaged in maritime employment, and therefore was not an employee covered by the Act. The Board held that "a claimant's employment must have a realistically significant

relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section Section 2(3)." The Board's opinion, while admitting that the new bridge would be an aid to navigation, said:

> However, the James River Bridge, like all bridges, is a means of land transportation, not maritime commerce. As claimant points out, the bridge was being constructed in a manner to minimize its actual obstruction of maritime traffic. Nevertheless, the very presence of a bridge obstructs navigation, serves no maritime purpose and in no way benefits navigation and commerce.

We do not agree with that rationale and hold that the work performed by LeMelle was maritime employment as defined in section 2(3). It is not necessary to relate again the tortured history of employee coverage under the LHWCA, except to note that bridge

construction and demolition workers employed over navigable water were covered prior to the 1972 amendments. Davis v. Department of Labor, 317 U.S. 249 (1942); Hardaway Contracting Co. v. O'Keefe, 414 F.2d 657 (5th Cir. 1968); Peter v. Arrien, 325 F.Supp. 1361 (E.D. Pa. 1971), aff'd, 463 F.2d 252 (3d Cir. 1972).

This court said in Brown & Root, Inc. v. Jagner, 607 F.2d 1087, 1090 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980), "we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments."[1]

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[1] We did not indicate in Brown & Root, Inc., that Congress intended to include in the section 2(3) definition of maritime workers all workers held by pre-1972 judicial decisions to have been covered by the LHWCA; nor is it now necessary to decide that issue.

We hold, therefore, that the claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment, and is therefore an employee within the meaning of the Act. Although bridge demolition and construction is not classically maritime work under the "ancient traditions of the sea," it has long been merged with such work by the exigencies of modern coastal land and sea traffic. Essential to improving navigation and possessing many of the same hazards and working conditions as more traditional work on navigable waters, such employment carries with it the fundamental elements of what historically has been regarded as maritime employment.

REVERSED.

BRB No. 79-640

DECISION and ORDER

HOWARD LeMELLE

Claimant-Petitioner

v.

B. F. DIAMOND CONSTRUCTION COMPANY

and

AETNA CASUALTY & SURETY COMPANY

Employer/Carrier-Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

Appeal from the Decision and Order of Peter McC. Giesey, Administrative Law Judge, United States Department of Labor.

John H. Klein (Breit, Rutter & Montagna), Norfolk, Virginia, for the claimant.

Ralph E. Lawrence, Virginia Beach, Virginia, for the employer/carrier.

Mark C. Walters (T. Timothy Ryan, Jr., Solicitor of Labor, Laurie M. Streeter,

Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

This is an appeal by the claimant from the Decision and Order (79-LHCA-84) of Administrative Law Judge Peter McC. Giesey pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter referred to as the Act).

In his Decision and Order, the administrative law judge held that claimant was not a maritime employee within the meaning of Section 2(3) of the

Act, 33 U.S.C. §902(3). 1/

Claimant appeals, arguing that his duties constituted maritime employment under Section 2(3) of the Act. Upon its review of the case, the Board is required to affirm the decision of the administrative law judge if his findings are supported by substantial evidence in the record considered as a whole, are not irrational and are in accordance with law. 33 U.S.C. §921(b)(3); O'Keeffe v. Smith Associates, 359 U.S. 380 (1965).

Claimant was employed as a concrete finisher on the James River Bridge Project. He was injured in November 1977, when 200 to 300 pounds of mixed concrete fell on him. Claimant was working on a

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1/ Section 2(3) provides, "The term 'employee' means any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . "

piling some eight to 10 feet above the water. The piling was approximately one mile from shore and could be reached only by boat.

Claimant contends that his duties constituted maritime employment as defined by the Board in Sedmak v. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896, et al. (1978), aff'd sub nom. Fusco v. Perini North River Assoc., 622 F. 2d 1111, 12 BRBS 328 (2d Cir. 1980) cert. denied, 101 S. Ct. 953. In Sedmak, we concluded that " . . . a claimant's employment must have a realistically significantly relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." 9 BRBS at 386. Claimant contends that his work had a significant relationship to maritime activities since he was working on a

project which would benefit maritime commerce and improve navigation upon the James River.

The James River Bridge Project involved tearing down an old two-lane bridge and building a new four-lane replacement bridge. Claimant was engaged in the construction of the new bridge. Claimant points out that documents admitted into evidence, including an environmental statement and other documents which relate to the issuance of permits, indicate that the project was planned to improve auto travel across the river and to improve the navigation of the James River. See Cl. Ex. 1. The Coast Guard District Commander responsible for the issuance of construction permits stated in his findings that the James River is used by vessels ranging from ocean-going ships to small pleasure craft. He found that the new bridge would have

no adverse effects upon any vessels known to the Coast Guard nor would the bridge limit the types of vessels now using or expected to use the James River in the future. Cl. Ex. 1, Coast Guard Findings at 2.

According to claimant, the above evidence indicates that the new bridge will provide a significant aid to navigation, and that, therefore, claimant's work constructing the bridge constituted maritime employment. 2/ However, in Nold v. Guy F. Atkinson Co., 9 BRBS 620, BRB

2/ Our dissenting colleague argues that the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), should be applied to find coverage in this case. The dissent takes the position that the presumption is applicable to factual issues underlying the threshold issue of coverage under Section 2(3). Assuming arguendo, that the presumption may be so applied, there are no factual issues at dispute in this case. Claimant was engaged in bridge construction. The issue is thus one of legal interpretation, i.e., whether bridge builders are maritime employees within the meaning of Section 2(3).

Nos. 78-361/a (1979), the Board concluded that a claimant engaged in bridge construction was not within the Sedmak definition of maritime employment, notwithstanding the fact that he was "working on a portion of the bridge that was designed to avoid obstruction of navigation." Nold, 9 BRBS at 624. See also Gilliam v. Wiley & Jackson Co., 12 BRBS 556, BRB Nos. 79-388/a (1980), holding that a worker engaged in building bridges across the Amelia River was not a maritime employee.

Claimant seeks to distinguish Nold on the basis that the bridge involved in the instant case will actually aid and improve nagivation. However, the James River Birdge, like all bridges, is a means of land transportation, not maritime commerce. As claimant points out, the bridge was being constructed in a manner to minimize its actual

obstruction of maritime traffic. Nevertheless, the very presence of a bridge obstructs navigation, serves no maritime purpose and in no way benefits navigation and commerce. 3/ Thus, the construction work performed by claimant was not analogous to construction work serving a maritime purpose which is covered by Section 2(3). See Martin v. Kaiser Steel Corp., 9 BRBS 903, BRB No. 78-449 (1979); Silva v. Massman Construction Co., 9 BRBS 932, BRB No. 78-341 (1979). 4/ Rather,

3/ It is irrelevant that claimant's work did not involve the actual draw span of the bridge. Regardless of the part of the bridge he was working on, claimant was not covered by Section 2(3).

4/ Also without merit is claimant's argument that his work was similar to that of claimants held to be covered employees who constructed locks and piers. See Hunter v. Duncanson-Harrelson Co., 8 BRBS 83, BRB No. 77-433 (1978); Hed v. Duncanson-Harrelson Co., 7 BRBS 821, BRB No. 77-260 (1978); aff'd, F.2d , 13 BRBS 308, Nos. 78-1873, 79-7572 (9th Cir. May 8, 1981); Wright v. Taylor-Johnson Construction Co., 9 BRBS 372, BRB No. 77-591 (1978).

claimant's duties were more similar to those of claimant in Rhodes v. Healy Tibbits Construction Co., 9 BRBS 605, BRB No. 78-423 (1979), wherein we held that claimant's construction work on a pier which was to be used only for recreational fishing to carry a sewer pipe to the ocean was not an activity covered by Section 2(3) because the pier was not for any maritime use. Therefore, claimant's work did not constitute maritime employment as defined in Sedmak.

Claimant argues that even if he is not covered under the Sedmak definition of maritime employment, he was engaged in employment covered by pre-amendment law. In support of this contention, claimant cites several pre-amendment cases holding that construction workers similar to claimant were engaged in covered employ-

ment. 5/ However, we do not find pre-amendment law controlling in determining coverage under the Act. See Sedmak, v. Perini North River Assoc., supra, at 387. Therefore, we reject claimant's contention that pre-amendment case law is dispositive of coverage in this case.

Similarly, we reject claimant's contention that he is covered under the post-amendment Act because he would have been covered pre-amendment by cirtue of his injury having occurred on navigable waters. See Sedmak, supra. 6/

5/ Claimant relies heavily on Peter v. Arrien, 325 F. Supp. 1371 (E.D. Pa. 1971), aff'd per curiam, 463 F.2d 252 (3d Cir.1972), a pre-amendment case involving an employee engaged in the demolition of a bridge. This case is not applicable where claimant was engaged in the construction of a bridge. See Nold, supra.

6/ Claimant relies on the decision of the United States Court of Appeals for the Second Circuit which reversed our decision in Sedmak, sub nom. Fusco v. Perini North River Associates, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979). Subsequently, Fusco was vacated and remanded by the Supreme Court. 100 S.Ct. 697 (1980).

Therefore, we hold that claimant was not a maritime employee within the meaning of Section 2(3) of the Act. Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

SAMUEL J. SMITH, Chief
Administrative Appeals
Judge

(con'd)
Upon reconsideration, the Second Circuit affirmed our decision in Sedmak, rejecting a geographic interpreation of Section 2(3). Fusco v. Perini North River Associates, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), cert. denied, 101 S.Ct. 953 (1981).

Claimant also contends that the U.S. Court of Appeals for the Fourth Circuit has held that a claimant who would have been covered pre-amendment is automatically covered post-amendment by virtue of his injury having occurred on navigable water. However, in Brown and Root, Inc. v. Joyner, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), cert. denied, 100 S.Ct. 2960 (1980), the Fourth Circuit specifically declined to rule on this issue.

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' determination that claimant was not engaged in employment covered by Section 2(3) of the Act. In this case, my colleagues have applied a restrictive interpretation of Section 2(3) which denies coverage to a claimant clearly intended to be within the scope of the Act. In so doing, the majority once again ignores the statutory presumption contained in Section 20(a) of the Act as well as the long standing policy that the Act is to be liberally construed to carry out its beneficent purposes.

I.

Section 20(a) of the Act provides claimant with a presumption, in the absence of substantial evidence to the contrary, "that the claim is within the

provisions of the Act." 33 U.S.C. §920(a). As I pointed out in my dissenting opinion in Sedmak, 9 BRBS at 388, this presumption is applicable in determining whether claimant falls within the coverage provisions of the Act, including Section 2(3). However, in Sedmak, my colleagues held that the presumption contained in Section 20(a) of the Act was inapplicable to "the threshold issue of coverage such as status under Section 2(3)." 9 BRBS at 383. On the basis of this holding, my colleagues now ignore the Section 20(a) presumption in all cases involving coverage under the Act. However, as I shall make clear below, the majority's interpretation of Section 20(a) in Sedmak is not supported by the relevant case law.

In Sedmak, the Board majority relied on Pittston Stevedoring Corp. v.

Dellaventura, 4 BRBS 156, 544 F.2d 35 (2d Cir. 1976), aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo, 6 BRBS 150, 432 U.S. 249 (1977), and Stockman v. John T. Clark of Boston, 4 BRBS 304, 539 F.2d 264 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977), to support its holding that Section 20(a) is not applicable to the coverage provisions of the Act. However, neither case supports the proposition that the Section 20(a) presumption is inapplicable to the coverage provisions of the Act. The proper interpretation of these cases is that, while Section 20(a) applies to coverage, it does not apply to questions of statutory interpretation of the jurisdictional portions of the Act. Thus, the presumption does not operate to indicate the proper test in interpreting and determining the scope of Section 2(3), but does provide that a claimant is

presumed to meet any test "in the absence of substantial evidence to the contrary." 33 U.S.C. §920. This interpretation is illustrated by the language of the Second Circuit in Dellaventura:

> [Claimants] contend that if the meaning of the new coverage provision, 33 U.S.C. §903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substantial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See Crowell v. Benson, 285 U.S. 22, 64-65 (1932).
>
> Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. §902(2), could be widely stretched, the Court has done little more than mention the presumption, [citations omitted]. . . . The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption [citations omitted]. The cases in this court, Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645-46 (2 Cir.) cert. denied, 382 U.S. 835

> (1965), and Overseas African Construction Corp. v. McMullen, 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See Davis v. Department of Labor, 317 U.S. 249 (1942).

4 BRBS at 173-74, 544 F.2d at 48. [Emphasis added.]

In relying on Dellaventura, my colleagues have apparently ignored the latter portion of the court's statement, which is of primary importance in delineating the circumstances when the presumption does and does not apply. The Second Circuit stated that the

presumption was inapplicable to issues of legal interpretation involving where the line of coverage was to be drawn. The Court did not deny that, once the line is established, the presumption is to be applied to factual questions concerning whether claimant is within or outside of that coverage. Thus, the Court's view in Dellaventura is consistent with its earlier view in McMullen, which the Second Circuit relied on in Dellaventura.[1/]

1/ In Sedmak, my colleagues relied on Dellaventura, but stated that reliance on McMullen was misplaced. This statement was based on the fact that Dellaventura was a later case and entitled to more weight. The majority also noted in Sedmak that the McMullen court held that a prima facie showing of jurisdiction had been made and therefore did not rely totally on the Section 20(a) presumption. Thus, in Sedmak, my colleagues ignored the fact that McMullen had been relied on by the Second Circuit in Dellaventura: instead, they took pains to undermine the authority of McMullen, apparently reading it as inconsistent with Dellaventura.

The First Circuit opinion in Stockman, which was also cited as support in Sedmak, is consistent with this approach. In Stockman, the court found that it need not give weight to the Section 20(a) presumption in that case, stating

> [this] provision relieves an injured employee from a perhaps bothersome burden in cases where coverage is uncontested, and it may well denote a policy favoring coverage in close cases; but we do not think it bears on the decision before us calling for a general construction of "whether Congress placed the line at the 'point of rest' or much further landward." Pittston, supra, at 4703-04. This basic interpretative decision must precede any application of the presumption.

4 BRBS at 310-11, 539 F.2d at 269. The Stockman court thus also denied applicability of the presumption to basic interpretative issues. The court does not say that the presumption is wholly inapplicable. Rather, Stockman supports

the proposition that legal questions of interpretation must be settled before the presumption is applied to the underlying facts. In both Dellaventura and Stockman, the basic question did not involve the nature of an employee's employment, where the injury occurred, or any other question of fact. The courts' concern in both cases was with statutory interpretation involving the reach of the coverage provisions of the Act. In the context of this issue, the presumption was held inapplicable.

As I will demonstrate more fully below, application of the presumption to the facts of the instant case provides coverage for claimant under any interpretation of Section 2(3). The burden was on employer to show that claimant's employment did not involve activity within Section 2(3). However, claimant is nonetheless entitled to coverage in

this case even if the presumption is not applied, because the facts in the record can lead to no other conclusion.

Claimant was employed as a concrete finisher on the James River Bridge project. At the time of the injury, he was working in a concrete form on a piling, standing some eight to 10 feet above the water of the river. His work area was approximately one mile from shore and could be reached only by boat. Thus, claimant's injury occurred upon the "navigable waters" of the United States as defined prior to the 1972 amendments to the Act, and claimant would have been covered under the Act prior to the 1972 amendments. In my view, this fact is dispositive of coverage subsequent to the 1972 amendments to the Act. See my dissents in Gilliam v. Wiley N. Jackson Co., 12 BRBS 556, BRB Nos. 79-388/A (1980); Churchill

v. Perini North River Assoc., 12 BRBS 929, BRB Nos. 79-113/A et al. (1980); Sedmak. Thus, claimant was engaged in maritime employment within Section 2(3) of the Act on this basis alone.

Moreover, in my dissent in Gilliam, I fully discussed preamendment case law holding that employees engaged in bridge construction were engaged in maritime employment and thus were covered by the Act. See, e.g., Davis v. Department of Labor & Industries, 317 U.S. 249 (1942); Dixon v. Oosting, 238 F.Supp. 25 (E.D. Va. 1965); Peter v. Arrien, 325 F.Supp. 1361 (E.D. Pa. 1971) aff'd per curiam, 463 F.2d 252 (3d Cir. 1972). This case law is controlling authority for holding claimant in the instant case covered under the 1972 amendments to the Act.

My colleagues, however, have stated their view that preamendment law is not controlling, but serves only as a "useful

framework" for ascertaining coverage under the amended Act. However, it is disconcerting to realize the the "useful framework" language is cited primarily as a basis for refusing to apply pre-amendment law. See Miller v. Central Dispatch, Inc., 12 BRBS 793, BRB Nos. 78-467/A & 79-655/A (1980); Cunningham v. Sweco Inc.,11 BRBS 792, BRB No. 78-552 (1980); Holcomb v. Robert W. Kirk & Assoc., Inc., 11 BRBS 835, BRB No. 78-566 (1980). It is a rare case indeed where my colleagues would actually find pre-amendment precedent "useful." The Fourth Circuit in Brown & Root, Inc., v. Joyner, 11 BRBS 86, 607 F.2d 1087 (1979), cert. denied, 100 S.Ct. 2960 (1980), found it unnecessary to consider whether Congress intended the 1972 amendments to the Act to exclude employees of maritime businesses who would have been covered before 1972 because their injuries

occurred on navigable waters regardless of the nature of their work. However, the court stated "we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." 11 BRBS at 97, 607 F.2d at 1090 (emphasis added). In the instant case, as discussed above, there is ample precedent under the pre-amendment Act supportive of a finding that claimant was engaged in work which is maritime in nature.

Case law decided prior to the 1972 amendments to the Act contains analysis supportive of coverage which is certainly "useful". While I cannot agree with my colleague's Sedmak definition of maritime employment, claimant in this case was clearly engaged in "maritime activities involving navigation and commerce." Although I do not agree with

my colleagues' focus on the purpose a structure is built to serve in ascertaining whether a claimant engaged in its construction is within this definition, I will highlight the case law and evidence which requires coverage of claimant in this case even under my colleagues' restrictive view.

In Peter v. Arrien, the court reversed a denial of benefits which was based on a finding that the construction or demolition of bridges was within state jurisdiction and was not maritime employment. The court stated that "[i]njuries to employees engaged in the construction or demolition of bridges are compensable under the Longshoremen's Act." 325 F. Supp. at 1365. The court therefore found that decedent, engaged in the demolition of a bridge by operating a crane from a cross way extending 300 feet into the river, was covered by the

Act. The court concluded that this worker was engaged in maritime employment and noted that his duties were directly concerned with a maritime purpose. In Morrison-Knudsen Co. v. O'Leary, 288 F.2d 542 (9th Cir. 1961), the court found an employee engaged in the construction of a dam covered by the Act. Analyzing the maritime nature of the employee's work, the Court found that the dam was being built "in aid of navigation." Thus, an employee killed during its construction was engaged in maritime employment. Construction of an offshore lighthouse was held to involve maritime employment in yet another pre-amendment case, Merritt-Chapman & Scott Corp. v. Bassett, 580 F.Supp. 488 (W.D. Mich. 1943). Even under the majority's view of the limited use of pre-amendment law, these cases provide a "useful framework" for holding claimant

covered under my colleagues' Sedmak definition.

My colleagues further ignore the clear facts in the record, which show that the James River Bridge Project will actually aid navigation on the James River. Instead, they characterize the bridge as an instrument of land transportation and find it is an obstruction to navigation, thus dismissing claimant's arguments. The clear and uncontroverted evidence is that the construction project was planned from the beginning with an intention to improve and increase navigation of the James River. Thus, this construction project, like those discussed above, actually aided navigation and was thus maritime in nature under even my colleagues' Sedmak definition.

The evidence on this point could not be clearer. A negative declaration of the Virginia Department of Highways

states "[t]he construction of a new bridge is intended to provide a safer crossing for the anticipated increase in traffic and greater clearance for waterborne traffic, than the existing bridge." Cl. Ex. 1, Negative Declaration, July 15, 1974, at 2. The negative declaration also states that "[t]he clearance between the main channel piers of the existing bridge provides too narrow a margin of safety for present day navigation. It poses particular difficulties for a series of barges being towed which have to negotiate the sharp turn from Hampton Roads just before passing under the bridge. The fender system has been hit by passing boats on many occasions." Cl. Ex. 1, Negative Declaration, July 15, 1974, at 3. An October 30, 1974, letter to the Commandant from the Commander, Fifth Coast Guard District, points out the following advantages of the new

bridge:

> The proposed bridge provides 100 feet more horizontal clearance than the existing bridge. The additional horizontal clearance allows more space for use by vessels passing each other beneath the bridge and reduces the chances of a vessel collision with the bridge. The proposed bridge provides 10 feet more vertical clearance than the existing bridge, which is expected to eliminate most draw openings except for ocean going ships.

Cl. Ex. 1, Letter of October 30, 1974, at 1. An April 4, 1978, negative declaration of the Virginia Department of Highways, Environmental Quality Division, states "the increased vertical and horizontal clearances of the proposed bridge will have a long term beneficial impact on the movement of waterborne traffic." Cl. Ex. 1, Environmental Assessment for James River Bridge, at IV. In addition, the Coast Guard District Commander stated that the James River is used by vessels ranging from

ocean going ships to small pleasure craft. The Commander continues: "No vessel known to the Coast Guard will be adversely affected by the proposed bridge. The proposed bridge would not limit any craft now using or expected to use the waterway." Cl. Ex. 1, Coast Guard Findings of Fact, at 2. These facts show that this project will, in fact, improve navigation on the James Ri-er. Therefore, construction of the bridge involves a maritime act.vity within my colleagues' understanding of the term.

It is irrelevant that claimant was engaged solely in work constructing the new bridge and not in demolishing the old one. To view claimant's work in the construction of the bridge without taking into account the purpose of the entire project is to ignore the evidence in the record. The evidence clearly establishes

that the new bridge would not have been permitted without the obligation to tear down the old one. See Cl. Ex. 1, Letter of May 12, 1972 (denying application for construction permit). Thus, one part of the project could not proceed without the other. To exclude any claimant from coverage solely on the basis that a construction project is non-maritime, as my colleagues would, is error. To exclude him because of the nature of a portion of the project compounds this error. Such a limited focus further narrows an already unduly restrictive view of coverage.

Not only does the test used by my colleagues restrict the scope of Section 2(3) in an unsupported manner, but it is applied in such a manner as to further narrow the test. My colleagues apply their Sedmak language as the sole means for an employee to qualify for

coverage as a maritime employee. The majority assumes that, since the Supreme Court has referred to a two-part test which is occupational, see P. C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979), it need not consider arguments relating to the requirements of working on navigable waters which are unique to that form of employment. Rather, the majority focuses narrowly on the nature of the project alone in order to determine coverage. However, the fact that a structure is being built over water dictates special conditions of employment. Work performed over water is not like working on land. As the Ninth Circuit noted in Duncanson-Harrelson Co. v. Director, OWCP, 13 BRBS 308, F.2d, Nos. 78-1873, 79-7572 (9th Cir. May 8, 1981), an important factor in determining whether claimant is engaged in maritime employment is whether his"work exposed him to many of the

'perils of the sea' associated with traditional maritime activity." 13 BRBS at 310. In this case, it is undisputed that claimant had to wear a life jacket and could move only a few feet in either direction without falling into the water. Moreover, his work site could be reached only by boat, and it was by boat that he was conveyed to shore after his injury. Such occupational factors clearly illustrate that the fact a claimant was required to perform his work on navigable water should control the outcome.

The majority here narrowly applies an already restrictive test to exclude claimant from coverage. They also narrow the scope of the Act by refusing to apply the presumption in Section 20(a), which requires that employer submit substantial evidence indicating claimant was not covered. Not only is there a total absence of such evidence, all evidence

admitted is supportive of coverage.

My colleagues' restrictive view of Section 2(3) requires that the facts in the instant case be ignored and the law twisted so that claimant might be held outside the jurisdiction of the Act. This is contrary to the established principle that the Act is to be construed in conformance with its beneficent purpose. As the Supreme Court stated in Northeast Marine Terminal Co. v. Caputo, 6 BRBS 150, 161, 432 U.S. 249, 268 (1977), "[t]he language of the [1972] Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation." My colleagues in this case deny coverage to a claimant who would have been covered prior to the 1972 Amendments. Such a result is clearly inconsistent with the intention of Congress:

> Section 2(a) amends section 2(3) of the Act to define an "employee" as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of 2(3) which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than eighteen tons net. [Emphasis added.]

S. Rep. No. 1125, 92d. Cong., 2d Sess. 16 (1972); H. Rep. No. 1441, 92d Cong., 2d Sess. 14 (1972). Claimant herein is deprived of coverage to which he is fully entitled. I dissent.

/s/ Julius Miller

JULIUS MILLER
Administrative Appeals Judge.

Dated this 11th day
of June 1981

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700 - 1111 20th Street, N.W.

In the Matter of

HOWARD E. LEMELLE

Claimant

v.

B. F. DIAMOND CONSTRUCTION COMPANY INCORPORATED

Employer

and

THE AETNA CASUALTY AND SURETY COMPANY

Carrier

Case No. 79-LHCA-84

OWCP No. 5-19771

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BEFORE:
PETER MCC. GIESEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation for permanent total disability under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (hereafter, "the Act").

A hearing was held in Norfolk, Virginia, on April 3, 1979.

Having considered the entire record, including the testimony, exhibits 1/ and briefs of the parties and having observed the demeanor of the witness, I make the following findings of fact, conclusions of law and decision and order based thereon.

1/ Following the hearing, claimant's counsel submitted medical reports of three physicians. These have been marked Claimant's Exhibits #5 and #6 and entered in evidence.

Statement of the Case

Claimant was injured in the course of his employment with respondent employer on November 23, 1977. Notice and claim were timely given and filed. Controversion was filed some weeks later. 2/

At the time of injury, claimant was working as a cement finisher on the new James River Bridge.

Findings of Fact and Conclusions of Law

The facts are as stated.

The statement is brief because the claim must be dismissed for lack of coverage by the Act.

Counsel for respondents has relied in substantial part upon the decision of my colleague in Broome v. B. F. Diamond Construction Co., 5 BRBS 69 (ALJ) where another of respondent's employees working

2/ Though opportunity was given counsel for the submission of the controversion form, it is not in the record.

on the James River bridge was found not to be engaged in maritime employment. Ordinarily, the decisions of administrative law judges constituting no precedent, it would be with considerable caution that such a decision could be regarded as authority. In this case, although the Benefits Review Board did not review the Broome case, it has cited and distinguished it with apparent approval in its decision in Dantes v. Western Foundation Corporation Association ____ BRBS ____, BRB No. 78-517, May 21, 1979, p. 5 n. 2.

Accordingly, I find that claimant herein was not engaged in maritime employment and that his claim is not within the coverage of the Act.

Order

The claim of Howard E. LeMelle is denied.

PETER McC. GIESEY
Administrative Law Judge

Dated: August 2, 1979

Washington, D.C.